Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

T.S.,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 54,
STROUD, OKLAHOMA

On Petition For Writ of Certiorari
To The United States Court of Appeals, Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ALLEN MITCHELL, OBA #6264
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24 pp

INTRODUCTORY STATEMENT

T.S. is a disabled person entitled to certain services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq. T.S. requested a due process hearing on the failure of the school district to provide all of the procedural safeguards required by IDEA. The due process hearing was denied and T.S. asked the Federal District Court for the Western District of Oklahoma to overturn that decision in an administrative appeal. The District Court upheld the refusal of a due process hearing on April 10, 2000. T.S. appealed the decision of the District Court to the Tenth Circuit Court of Appeals, which vacated the judgment of the District Court on September 10, 2001, holding that since the thrust of T.S.'s claim was procedural, there was not enough substantive basis for the District Court to take jurisdiction to hear the initial administrative appeal.

CITATION OF DECISION APPEALED FROM

U.S. Court of Appeals, 10th Circuit No. 00-6165
2001 10CIR 1054
265 F.3d 1090

QUESTION PRESENTED FOR REVIEW

Did the Appeals Court err in denying that the District Court had jurisdiction to hear an administrative appeal of a due process claim under the IDEA?

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PETITION

I. STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to hear this matter, which is an appeal of a decision of the Tenth Circuit Court of Appeals issued on September 10, 2001. That decision vacated the finding of the Federal District Court for the Western District of Oklahoma on a matter brought to the District Court on administrative appeal under the Individuals with Disabilities Education Act of 1990 ("IDEA"), 20 U.S.C. §1400 et seq. The IDEA grants the right of access to the Federal Courts at 20 U.S.C. 1415(i)(2).

II. STATEMENT OF THE CASE

Plaintiff/Appellant, T.S., was a student provided services by defendant under the terms of the Individuals with Disabilities Education Act of 1990 ("IDEA"), 20 U.S.C. §1400 et seq. T.S.'s educational program was spelled out in his Individualized Educational Plan ("IEP"), which was reviewed at least annually by the IEP team, including administrators, teachers, T.S., and his parents. Although two IEP team meetings were convened in the Spring semester of 1999, T.S.'s senior year, neither of these meetings was an exit IEP meeting, nor did either of these meetings focus on the issue of T.S.'s graduation and the requirement therefore.

On the last day of school in the Spring of 1998, T.S. delivered to the defendant a request for a due process hearing challenging whether the defendant was providing T.S. with a free and appropriate public education ("FAPE"). The request was referred to a hearing officer who claimed that T.S. had, by the time the request was served, fulfilled all the requirements for regular graduation and the officer denied the request for a hearing, taking the position that T.S.'s senior year was technically completed when the request for hearing was served and he was at that time no longer due any services to provide a FAPE; since he was not due any services, a due process hearing officer, even if he found for T.S., could not order any remedy in the form of services; and thus T.S. was precluded from arguing that the defendant had failed, prior to his completion of the school year, to provide him with a FAPE.

Plaintiff/Appellant came to the District Court appealing this administrative action, identified as Due Process Hearing No. 1670 by the Oklahoma State Department of Education. Plaintiff

had alleged that he had the right to an "exit IEP meeting" prior to his graduation from the school district/Defendant's high school, that he had the right to transition services to his post-graduation life and that he had the right to notice of graduation as a change in placement. The Defendant alleged that the student's graduation precluded an examination of the issue of whether student had the necessary IEP review and transition planning and whether he had adequate notice of graduation under IDEA. Defendant asked the court to affirm the decision of the hearing officer.

The District Court agreed with the Defendant and upheld the findings of the hearing and appeals officers, denying the student a due process hearing on the matter. The finding was appealed to the Tenth Circuit Court of Appeals, which vacated the District Court's finding, determining, instead, that T.S. had made no substantive claim that his graduation was invalid and thus Defendant's procedural failures were immaterial.

III. ARGUMENT

1. The proper venue for initiating a substantive claim in regard to the validity of his graduation was the "Exit IEP" that T.S. was denied.

According to the regulations of the State of Oklahoma, an IEP meeting must be held before graduation to review graduation requirements and evaluate the extent to which the student has met those requirements.

> When a student with disabilities is expected to complete graduation requirements and to receive a high school diploma, the IEP team should convene, at an appropriate time before graduation, to review the IEP ensuring that graduation requirements have been met and that the goals and objectives in the IEP will be completed. The IEP Review (SDE Form 8) may be utilized for this purpose. Graduation is considered to be a change of placement fulfilling the LEA's obligation to provide FAPE. Upon graduation, eligibility for special education and related services ceases. For students with disabilities, this change in placement requires all appropriate procedcural safeguards, including prior written notice to parents and access to due process proceedings, as necessary. *Policies and Procedures* at 80.

It is in this "Exit IEP" procedure that any claim that graduation was not appropriate should have been raised.

However, T.S. was denied this process, and thus the opportunity to make the substantive claim that graduation was premature.

2. T.S.'s remedy for the school district's failure to provide the required "Exit IEP" was a "due process" hearing which T.S. was denied.

> According to the IDEA, the parents of a student served under this statutes terms have the right to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. 1415(b)(6)

This opportunity to complain takes the form of a due process hearing.

> Whenever a complaint has been received under subsection (b)(6) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency. 20 U.S.C. 1415(f)(1)

T.S. requested this due process hearing, but the school district denied it based on their claim that he had already graduated and was due no services. This was the heart of the school's defense in the District Court. The Tenth Circuit

acknowledged that there were unsettled factual questions in regard to the school's claim that T.S. filed his request for a hearing after he had graduated, but that court refused to order those issues clarified.

> [T.S.] thus arguably submitted the request [for due process hearing] prior to graduation *and* possibly prior to meeting the requirements for graduation, thereby establishing the need for the procedural safeguards he desires. Were we required to address this issue, we perhaps should have to remand for a determination whether T.S. had in fact graduated before submitting his request. However, these factual determinations are unnecessary because nowhere in the district court or on this appeal has T.S. explicitly contested his graduation or made a viable claim of entitlement to post-graduation relief. *Opinion* at ¶18.

Since T.S. had not **already** challenged his graduation, the court here erroneously denied him the due process hearing which was the statutory "doorway" to the IEP meeting which state regulations required to allow him to make that very challenge. This is a true "Catch 22" situation.

IV. CONCLUSION

The issue in this matter is really very s .nple: Did the School District comply with the law regarding Exit IEP meetings and due process hearings under the terms of the Individuals with Disabilities Education Act of 1990 ("IDEA") 20 U.S.C. §1400 et seq. and the regulations of the Oklahoma Department of Education. The answer is a resounding "NO". The regulations are specific that graduation with a regular diploma is a change in placement and an Exit IEP meeting is required to examine the progress of the student in the light of the impending graduation. *Policies and Procedures* 80.

The Tenth Circuit erroneously found that T.S. is due no exit IEP meeting because he is graduating with a regular diploma, ignoring the fact that T.S. is graduating with a regular diploma because there was no exit IEP meeting wherein he might have formally challenged the appropriateness of a regular diploma. In effect, the court asserts that T.S. has no basis to

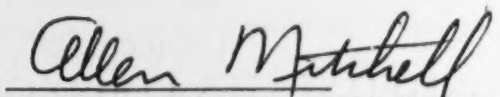
appeal to the court because he has not shown that he has been denied a FAPE, but T.S. is not in the position to assert that he has been denied a FAPE without the assessment that should have been made by his Exit IEP.

The Appeals Court stresses that the school's failures are merely procedural and as such fail to impact the substance of T.S.'s FAPE . But these procedures exist for a reason: to give the student and the parents the opportunity to participate in and challenge the process at every step of the way. Procedure in this case has a significant substantive impact. Without providing T.S. and his parents with the opportunity to examine whether he should have been graduated with a regular diploma, the defendant has short circuited the system. Procedure **does** matter. And in this case, school's failure to adhere to the procedure spelled out in statute and regulation have left T.S. without the opportunity or forum to argue that he was denied a FAPE. The Tenth Circuit's rejection of jurisdiction on the basis of its substantive/procedural dichotomy results in a denial of T.S.'s

rights under IDEA.

This court is asked to grant T.S.'s Petition for Certiorari.

Respectfully Submitted,



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T.S. v. INDEPENDENT SCHOOL DIST. NO. 54

2001 10CIR 1054

265 F.3d 1090

Case Number: 00-6165

Decided: 09/10/2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

T.S., Plaintiff-Appellant

v.

INDEPENDENT SCHOOL DISTRICT NO. 54, STROUD, OKLAHOMA, Defendant-Appellee.

Appeal from the United States District Court for the Western District of Oklahoma

(D.C. No. CIV-99-1616-W) Before EBEL, MCKAY, and CUDAHY,* Circuit Judges.

CUDAHY, Circuit Judge.

¶1 T.S. was a high school student who was entitled to certain services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. His education program was part of an Individualized Educational Plan (IEP) under which Independent School District Number 54 provided T.S. with a free and appropriate public education (FAPE). See 20 U.S.C. § 1414(d). T.S. appeals the denial of a due process hearing on the failure of the school district to provide the procedural safeguards required by the IDEA. We find that neither we nor the district court have jurisdiction over this appeal, and we therefore vacate the judgment of the district court.

¶2 The IDEA guarantees that children with disabilities have access to "a free and appropriate public education which emphasizes special education and related services designed to meet their unique needs . . . ." 20 U.S.C. § 1400(c). To meet this goal, the IDEA provides federal funding to state and local agencies and requires them to provide each child with an IEP. An IEP is a written statement that includes such matters as the child's level of educational performance, annual goals, services to be provided to the child and the like. See 20 U.S.C. § 1414(d). A school district satisfies its obligation to provide a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 203 (1982). Parents have the right to seek review of any decisions affecting their child's education through a due process hearing conducted by the state educational agency. See 20 U.S.C. § 1415(f)(1); Honig v. Doe, 484 U.S. 305, 311-12 (1988).

¶3 At the beginning of his senior year at Stroud High School, T.S. requested a due process hearing from the Oklahoma State Department of Education on the grounds that the school district had denied him a FAPE. The matter was assigned to a hearing officer, Mark L. Reed. At the hearing, T.S. alleged that the school district had denied him a FAPE because his IEP did not identify a weakness in his typing skills and did not address his preferred modifications for his English and horticulture classes. Reed found in favor of the school district, and T.S. appealed. In April 1999, the appeal officer affirmed Reed's decision. He held that T.S.'s IEP was appropriate, needed no modification and exceeded the school district's obligations under the IDEA. Although he had a right to do so, see 20 U.S.C. § 1415(i)(2)(A), T.S. did not appeal this decision to the federal district court.

¶4 That same month, a team meeting regarding T.S.'s IEP was held. This was apparently the second team meeting of that year, but it was not an "exit IEP meeting" and, T.S. argues, it did not focus on the issue of transition services for his post-graduation life.

¶5 The school in regular course concluded that T.S. had successfully completed all of his academic requirements to allow him to graduate. Yet on May 19, 1999, the last day of school, T.S. delivered a request for a due process hearing to the school district. He also sent the school district a

letter, dated May 18, claiming that his IEP was insufficient and that, therefore, the April team meeting had been improperly conducted. The school district concluded that T.S. had graduated before the request for a due process hearing was received and thus he was due no further relief under the IDEA. The hearing officer agreed with this position, and concluded that he lacked jurisdiction to hold a due process hearing on the issue. T.S. again appealed, and the appeals officer affirmed that decision. T.S. then asked the district court to order a due process hearing, and that request was denied. The court concluded that the administrative decisions to deny T.S.'s requests for a due process hearing were proper. T.S. now appeals.

¶6 Our first task is to determine whether we have jurisdiction over this case. If a student has graduated from high school and does not contest his graduation, the case is moot. See Board of Educ. v. Nathan R., 199 F.3d 377, 381 (7th Cir. 2000). Once a student has graduated, he is no longer entitled to a FAPE; thus any claim that a FAPE was deficient becomes moot upon a valid graduation. See id.; see also Neshaminy Sch. Dist. v. Karla B., 25 I.D.E.L.R. 725, 727 (E.D. Pa. 1997). This rule applies, of course, only where a student does not contest his graduation, and where he is seeking only prospective—rather than compensatory—relief.

¶7 We therefore only consider T.S.'s claims in light of the remote possibility that they could be construed as a challenge to T.S.'s graduation from Stroud High School, and the chance that they seek compensatory educational services. The difficulty here is the murkiness of T.S.'s claims. While we doubt that he seriously challenges his graduation, and we also question that he seriously seeks some sort of compensatory relief, there is an inkling of those possibilities lurking in T.S.'s various arguments. However, it is just an inkling—and that is hardly enough to overcome the apparent mootness of his claim. For T.S. was apparently prepared for, actually sought and was properly deemed eligible for graduation from high school at the end of his senior year. This conclusion is bolstered by the school district's noting that T.S. was attending college after his high school graduation and that he achieved a 3.6 grade point average during his first college semester—facts T.S. does not contest.

¶8 T.S.'s only clear request here is for a due process hearing, and, at least in

connection with a suggestion of an improper graduation, we have jurisdiction to consider such a purely procedural claim—but only if it is connected with substantive relief. For a claim based on deprivation of a due process hearing and/or other procedures, to be cognizable, must be linked with a consequent loss of substantive benefits. Here, these deprivations must involve loss of qualification for graduation. This loss would import defects in the educational program such that T.S. had yet to meet certain requirements for graduation from the district. Thus, T.S. would have to argue that his graduation was invalid. It is difficult to find any such contentions in T.S.'s submissions on this appeal.

¶9 Nevertheless, we shall examine T.S.'s arguments to determine whether they arguably call for the invalidation of his graduation and for compensatory relief. We review the decision of the district court de novo, applying the same standard of review to the hearing officer's determination as did the district court. Murray v. Montrose Cy. Sch. Dist., 51 F.3d 921, 927 (10th Cir. 1995). Thus, we actually apply a modified de novo review, which entails an independent review of the evidence, and "a decision based on the preponderance of the evidence, while giving 'due weight' to the administrative proceedings below." Id. (quoting Doe v. Board of Educ., 9 F.3d 455, 458 (6th Cir. 1993), cert. denied, 511 U.S. 1108 (1994)).

¶10 The crux of T.S.'s argument is that graduation constitutes a "change in placement" under the IDEA, and that therefore the school district was required to give him formal notification of the impending graduation, an exit IEP meeting and notice of his available options related to the proposed change in placement. See 34 C.F.R. 300.122(a)(3)(iii). T.S. also argues that local educational agencies must, before determining that a child is no longer a child with a disability eligible for services, evaluate or reevaluate the child. See 20 U.S.C. § 1414(c)(5). Gone from his claims are the allegations in his initial due process hearing requests, and his main chance of contending that he contests the propriety of his graduation.[1] First, T.S. argues that notice of his impending graduation should have been given. See 34 C.F.R. 300.122(a)(3)(iii) ("Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice . . . "). However, T.S. does not claim that this lack of notice rendered his graduation invalid. By failing to directly challenge the validity of his

graduation, T.S. essentially concedes both that the claimed procedural defect was harmless and that the appeals officer had no jurisdiction to hear his claim. See Nathan R., 199 F.3d at 381 (finding that a student's IDEA claim became moot once he graduated and was no longer entitled to services).[2]

¶11 T.S. also contends that there was a requirement for an "exit meeting," of which he was deprived. If there were such a requirement, that requirement was not met and T.S.'s graduation, as a result, might not have been authorized; arguably he might thereby allege a substantive deprivation. But, as will appear, T.S.'s argument does not really add up to such a claim. For T.S. argues that, at the allegedly required exit meeting, the student's education program must be reviewed to ensure that graduation is appropriate. See Policies and Procedures for Special Education in Oklahoma 80 (1993). But there is no such requirement under the IDEA. He cites 20 U.S.C. § 1414(c)(5), which states that "[a] local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability." But the regulation implementing that section specifically states that the prescribed evaluation is not required before a termination of benefits due to graduation with a regular high school diploma. 34 C.F.R. § 300.534 (West 2001). T.S. attempts to find support in the Oklahoma State Department of Education handbook, Policies and Procedures for Special Education in Oklahoma, but neither party indicates whether the provisions of this handbook are legally binding. Even assuming that the handbook creates an entitlement to an "exit meeting" under Oklahoma law (which would be quite a leap, and one not sustainable on the current record), we still fail to see any substantive deprivation resulting from the alleged procedural defect. Hence, there is no basis for compensatory relief, or for an impliedly invalid graduation.[3]

¶12 Third, T.S. argues that, in the absence of an exit IEP meeting and adequate notice of an impending change in placement, the school district should have convened a due process hearing to address any deficiencies. This conclusion is justified, T.S. argues, because the IDEA requires local educational agencies to provide an opportunity for students and parents to "present complaints with respect to any matter relating to the identification.

evaluation, or educational placement of the child . . . ." 20 U.S.C. § 1415(b)(6). This "opportunity" must take the form of a due process hearing. 20 U.S.C. § 1415(f)(1). Again, T.S. has alleged no substantive deprivations related to the alleged procedural defect. He apparently views a due process hearing as a sort of discovery device to identify possible substantive deprivations that he has no obligation to point to in advance. In the present circumstances, we think this is an unrealistic approach without some accompanying challenge to graduation for graduation deprived him of his right to a due process hearing. And T.S. has not argued that he was not qualified to graduate or that procedural defects denied him a FAPE, and that he therefore is entitled to compensatory relief.[4] We conclude that T.S. has waived any such substantive claim.

¶13 Even if we were to assume that T.S. was challenging his graduation certainly a questionable assumption), T.S. has waived any argument that the school district denied him a FAPE because he has not made such a contention on appeal. It is well-settled that, without a claim that the FAPE was deficient, procedural defects are not actionable. See Erickson, 199 F.3d at 1123 ("[A] school district's failure to comply with statutory IEP content requirements did not amount to a substantive deprivation, so there was no violation of the student's right to a FAPE.") (citing Urban v. Jefferson Cy. Sch. Dist. R-1, 89 F.3d 720, 727 (10th Cir. 1996)); O'Toole, 144 F.3d at 707; see also Doe v. Defendant I, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (declining to "exalt form over substance" by holding that technical deviations from procedural requirements render an IEP invalid). Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.

¶14 T.S.'s only explanation for his lack of a substantive claim is that he is not in a position to assert denial of a FAPE because he cannot know this without the aid of a due process hearing or an exit evaluation. But he does not argue that the alleged procedural mistake was itself a deprivation of a FAPE. Thus, he necessarily does not argue that the deprivation caused his graduation to be improper. Even if we were to stretch the language of T.S.'s brief, we still could not glean from it a claim of substantive deprivation. The closest thing to a substantive claim appears in T.S.'s memorandum to the district court. There, he wrote: "Higher education institutions beyond

high school are not required to provide accommodations that are not documents [sic] in the student's IEP." This may imply that—regardless whether T.S. properly graduated—he is still entitled to some service from the school district in his post-secondary life. Conceivably, such a request could amount to a demand for prospective relief that was within this court's jurisdiction. However, we are aware of no legal support for T.S.'s contention. Post-secondary institutions that receive federal funding are required to allow students with disabilities to receive the benefits of post-secondary education. See 34 C.F.R. § 104.43 (West 2001). But there is no requirement of documentation by way of the student's IEP in high school to establish the student's eligibility for post-secondary accommodation. We cannot devise a substantive claim from T.S.'s argument when he has failed to clearly articulate such a demand.

¶15 T.S. also makes a murky argument implying that he failed to obtain necessary "transition services," but does not identify what such services might be. In any event, any such services are a request for prospective relief. Thus, they are no longer the responsibility of the school district, whose obligations ceased upon T.S.'s graduation. See Daugherty v. Hamilton Cty. Sch., 21 F.Supp.2d 765, 774 (E.D. Tenn. 1998) (plaintiff not entitled to post-secondary services where she did not contest the adequacy of her FAPE or her graduation); Chuhran v. Walled Lake Consolidated Sch., 839 F.Supp. 465, 473-74 (E.D. Mich. 1993), aff'd, 51 F.3d 271, 1995 WL 138882 (6th Cir. 1995). T.S., if still requiring services, may seek accommodations from his post-secondary institution under the Rehabilitation Act, 29 U.S.C. § 504. See also 34 C.F.R. § 104.43 (West 2001).

¶16 Much has been made of the timing of T.S.'s final due process hearing request. Had T.S. contested his graduation, or shown entitlement to some post-graduation services, the timing issue might have been sticky. The request for a due process hearing came on the day of T.S.'s graduation. The school district cites clearly established law that its obligations to T.S. ceased upon graduation. "The obligation to make FAPE available to all children with disabilities does not apply with respect to . . . [s]tudents with disabilities who have graduated from high school with a regular high school diploma . . . ." 34 C.F.R. § 300.122(a)(3)(i) (West 2001). Thus, if T.S. had

properly graduated, the hearing officer would not have had jurisdiction over his claims and he would properly have dismissed T.S.'s case. The request for a due process hearing was arguably made after T.S. had completed his educational program, and thus was entitled to no further services. This was the assumption made by the district court: "At the time T.S. submitted his requests, he had completed all requirements necessary for his secondary education. He was therefore no longer entitled to the protections and benefits of the IDEA, and in particular, no longer entitled to a due process hearing." Order at 9. "The obligation to make FAPE available to all children with disabilities does not apply with respect to . . . [s]tudents with disabilities who have graduated from high school with a regular high school diploma." 34 C.F.R. § 300.122(a)(3)(i) (West 2000). The high school IDEA obligations cease once the student has completed the general graduation requirements. See Chuhran, 830 F.Supp. at 473-74. The Code of Federal Regulations simply states that a student who has "graduat[ed] with a regular high school diploma" is no longer eligible to receive special educational benefits. 34 C.F.R. § 300.122(a)(3)(i). The district court found it "undisputed that T.S. has graduated from Stroud High School with a regular high school diploma, and that he did so prior to requesting the due process hearing that is the subject of the instant complaint." Order at 8-9.

¶17 In any event, the question of the specific point in time at which the due process hearing request became effective is immaterial. T.S. presumably mailed his request for a due process hearing prior to the last day of school (May 19) since it was received by the school district on May 20. He thus arguably submitted the request prior to graduation and possibly prior to meeting the requirements for graduation, thereby establishing the need for the procedural safeguards he desires. Were we required to address this issue, we perhaps would have to remand for a determination whether T.S. had in fact graduated before submitting his request. However, these factual determinations are unnecessary because nowhere in the district court or on this appeal has T.S. explicitly contested his graduation or made a viable claim of entitlement to post-graduation relief.

¶18 Whether we have jurisdiction of T.S.'s claims or not is a close question since his claims might be construed (if he contests the validity of his graduation) as seeking compensatory relief. They would then be denied on

the merits for the reasons we have set forth. We believe, however, that the substantive basis for T.S.'s requests is so thin, and a possible challenge to his graduation so elusive, that we think the case is moot.

¶19 For the foregoing reasons, we VACATE the judgment of the district court.

FOOTNOTES

[*]The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

[1]T.S. originally claimed, inter alia, that all areas of his disability were not addressed by the IEP goals and objectives; testing indicated his weakness in "word attack," and the school has failed to include this in his IEP; and all areas of T.S.'s suspected disability were not tested. And in his June 28 letter, he most clearly questioned the propriety of his graduation:

The school cannot neglect its obligations and stultify the requests of the student until 'graduation' happens and the school issues a 'regular diploma.' Again, in this case the school claims the student has graduated. But that is on paper only, a paper issued by the school. The procedural requirements, notice, and due process rights have not been afforded. The student has not properly and lawfully graduated."

None of these allegations appear in T.S.'s argument on appeal, and even if they did, we are uncertain whether even these are sufficient to produce a substantive claim or a sincere challenge to his graduation.

[2]Apparently, the school district concedes that neither T.S. nor his parents received the required formal written notice of eligibility for graduation. Yet, even if T.S. argued that this defect rendered his graduation invalid, he could not succeed. For this is, at best, a technical procedural defect, and does not constitute a failure to provide T.S. with a FAPE. See Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1120 n.4 (10th Cir. 1999). If there has been no substantive deprivation, procedural defects do not amount to a denial of FAPE. See O'Toole v. Olathe Unified Dist. Sch. No. 233, 144 F.3d 692, 707 (10th Cir. 1998).

[3]We need not decide whether Oklahoma's purported "exit meeting" requirements create an entitlement of which T.S. was deprived. We note, however, that the facts before us seem to present a picture of a school

district earnestly (and successfully) attempting to comply with the IDEA. [4]In his reply brief, T.S. does state that "[u]nder Oklahoma special education regulations, T.S. cannot lawfully graduate without an exit IEP meeting." Appellant's Reply Br. at 2 (citing Policies and Procedures for Special Education in Oklahoma at 80). But we need not consider arguments raised for the first time in a reply brief. Codner v. United States, 17 F.3d 1331, 1332 n.2 (10th Cir. 1994). Such arguments are considered waived. Id. And, in any event, we doubt that T.S. is seriously challenging his graduation here—every other aspect of his briefs and his statements at oral argument indicate that he is only seeking an exit IEP meeting, and nothing more.

Supreme Court, U.S.
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No. 01-945

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T.S.,

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v.

INDEPENDENT SCHOOL DISTRICT NO. 54,
STROUD, OKLAHOMA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Independent School District No. 54 of Lincoln County, Oklahoma (the "Stroud School District"), respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari filed herein. Petitioner fails to allege any reason for invoking this Court's certiorari jurisdiction beyond his contention that the United States Court of Appeals for the Tenth Circuit erred in the decision of this case. Petitioner ignores Rule 10 of the Rules of the Supreme Court and fails to identify any reason comparable to the reasons set forth therein for this Court to exercise its discretion and grant a writ of certiorari. Because Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Petitioner's request for a writ of certiorari should be summarily denied.

Moreover, Petitioner is wrong in asserting that the Tenth Circuit erred in its disposition of this case. Based on Petitioner's failure to allege that he was denied a free appropriate public education ("FAPE"), and based on Petitioner's failure to challenge his graduation from high school, the Tenth Circuit correctly held that Petitioner's claim that he was wrongfully denied a due process hearing under the Individual with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA") was moot. In the absence of a claim that a student has been denied FAPE, procedural, technical defects are not actionable under the IDEA.

Because Petitioner offers no "compelling reason[ ]" for this Court to exercise its discretionary power to grant

a writ of certiorari, as required by Supreme Court Rule 10, and because the Court of Appeals correctly applied existing law to Petitioner's claim, Petitioner's request for a writ of certiorari should be denied.

Factual Background

During the 1998-99 school year, Petitioner was a senior enrolled in and attending the Stroud School District. Petitioner had been determined to be eligible for services under the IDEA and was on an individualized education program ("IEP").

On September 25, 1998, Petitioner submitted a due process hearing request against the Stroud School District, which the Oklahoma State Department of Education ("SDE") designated as DPH No. 1634. Petitioner alleged that the Stroud School District had denied him FAPE because his IEP failed to identify a weakness in typing and his preferred modifications for his Accelerated Senior English and Horticulture classes. SDE assigned the case to a hearing officer who subsequently decided DPH No. 1634 in favor of the Stroud School District. Pursuant to the procedures established by SDE, Petitioner appealed the hearing officer's decision to an administrative appeal officer. On April 1, 1999, the appeal officer entered his decision in DPH No. 1634, holding as follows:

> The Student's Individualized Education Program is appropriate without further modification and/or adaptations. The School has offered the Student a free appropriate public education consistent with the requirements of the Individuals with Disabilities Education Act as interpreted by the Court in [*Board of Education v.*

> *Rowley*, 458 U.S. 176 (1982)]. The Student's program, in the opinion of this Officer, exceeds the *Rowley* standard.

Petitioner did not appeal this decision.

During the spring semester of Petitioner's senior year, Petitioner's IEP team met with Petitioner and his parents twice, with the first meeting occurring on April 18, 1999. As a result of this meeting, an IEP dated April 19, 1999, was written. The April 19, 1999, IEP was essentially identical to the IEP that the SDE appeal officer had characterized as "exceed[ing] the *Rowley* standard." At these IEP team meetings, Petitioner and his parents had ample opportunity to discuss any concerns they may have had about Petitioner's readiness for graduation from high school.

Petitioner successfully completed all of his academic requirements at the Stroud School District and graduated with his class at the end of the 1998-99 school year. Petitioner subsequently enrolled in college and achieved a 3.6 grade point average during his first college semester. *Opinion*, p. 12 of Petition for Writ of Certiorari.

The last day of classes at the Stroud School District for the 1998-99 school year was May 19, 1999. At approximately 3:10 p.m. that day, Petitioner delivered a due process hearing request dated May 18, 1999, to the Stroud School District. The next day, the School District received another due process hearing request dated May 18, 1999, through the mail. In these due process hearing requests, Petitioner claimed that his April 19, 1999, IEP was insufficient and that the IEP team meeting had been improperly

conducted. Significantly, Petitioner did *not* contest his graduation from high school.

The Stroud School District asked SDE not to assign Petitioner's May 18, 1999, due process hearing requests to a hearing officer, but SDE designated the requests as DPH No. 1670 and assigned the matter to the same hearing officer who had heard DPH No. 1634. During a pre-hearing conference the Stroud School District reasserted its objection to a hearing. After allowing the parties an opportunity to brief the issue, the hearing officer concluded that Petitioner's graduation from the Stroud School District with a regular high school diploma terminated his eligibility for FAPE and the hearing officer therefore lacked jurisdiction. An administrative appeal officer appointed by SDE subsequently upheld the hearing officer's decision. Petitioner sought review in the United States District Court for the Western District of Oklahoma.

Proceedings Below

Upon review of the record, the district court found that at the time Petitioner submitted his due process hearing requests he had completed all requirements necessary for his secondary education. As such, he was no longer entitled to the protections and benefits of the IDEA and, in particular, he was no longer entitled to a due process hearing. The district court therefore held that the decisions of the hearing officer and appeal officer were not erroneous and that Petitioner's requests for a due process hearing were properly denied.

On appeal, the United States Court of Appeals for the Tenth Circuit concluded that neither it nor the district court had jurisdiction over Petitioner's claims and vacated the judgment of the district court. The Court of Appeals emphasized the "murkiness" of Petitioner's claims and observed that Petitioner's "only clear request is for a due process hearing." *Opinion*, p. 12 of Petition for Writ of Certiorari. Finding no merit in Petitioner's insistence that he was entitled to a due process hearing notwithstanding his failure to allege that he had been deprived of any substantive educational benefits, the court trenchantly commented:

> [Petitioner] apparently views a due process hearing as a sort of discovery device to identify possible substantive deprivations that he has no obligation to point to in advance. In the present circumstances, we think this is an unrealistic approach without some accompanying challenge to graduation for graduation deprived him of his right to a due process hearing. And [Petitioner] has not argued that he was not qualified to graduate or that procedural defects denied him FAPE. . . .

Id., p. 15. The Court of Appeals concluded that Petitioner's claims were moot. *Id.*, p. 18.

Petitioner timely filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE WRIT

I.

The Court Should Not Grant Certiorari Based Solely on a Party's Assertion that the Court of Appeals Committed Error

The Justices of this Court have repeatedly stressed that this Court's certiorari jurisdiction is not merely a mechanism for the correction of perceived errors by the lower federal courts. "[A]s Rule 17.1 of the Rules of this Court makes plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring). "[C]ertiorari does not provide . . . 'a normal appellate channel in any sense comparable to the writ of error,' for the Court must limit its jurisdiction to questions that have significance beyond the immediate case." *Adams v. Illinois*, 405 U.S. 278, 287 n.4 (1972) (Douglas, J., dissenting), quoting *Fay v. Noria*, 372 U.S. 391 (1963). "This Court's certiorari jurisdiction should not be exercised simply 'for the benefit of the particular litigants,' . . . but instead for the 'settlement of [issues] of importance to the public as distinguished from . . . the parties.' " *Sullivan v. Little Hunting Park*, 396 U.S. 229, 250 (1969) (Harlan, J., dissenting) (citations omitted). "[C]ertiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.' " *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J., dissenting), quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).

Petitioner identifies no reason for this Court to grant certiorari herein beyond his argument that the case was wrongly decided by the Tenth Circuit. Petitioner offers nothing remotely comparable to the kind of reasons identified in Rule 10 of the Rules of the Supreme Court as implicating this Court's discretionary power of review. Petitioner does not suggest that the decision of the Court of Appeals is in conflict with that of another United States court of appeals on the same issue, conflicts with a decision by a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

Because Petitioner has identified nothing about this case that warrants the exercise of this Court's certiorari jurisdiction, the Petition for Writ of Certiorari herein should be denied.

II.

The Court of Appeals Correctly Ruled that Petitioner's Claims Were Moot Based on His Failure to Contest His Graduation from High School or to Allege that He Was Denied FAPE

This Court should also deny Petitioner's request for a writ of certiorari because the Court of Appeals correctly concluded that Petitioner's claims were moot.

Citing *Board of Education of Oak Park v. Nathan R.*, 199 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 822 (2000), the Court of Appeals noted that if a student has graduated from high school and does not contest his graduation, the case is moot. *Opinion*, p. 12 of Petition for Writ of

Certiorari. The court observed that Petitioner's "only clear request here is for a due process hearing." *Id.* The court recognized that federal courts have jurisdiction to consider such a purely procedural claim "only if it is connected with [a claim for] substantive relief." *Id.*, p. 13. Although expressing doubt that Petitioner intended to challenge his graduation from high school, *id.*, p. 12, the court nevertheless thoroughly examined each of Petitioner's arguments to determine if he had stated a cognizable claim.

The court noted that Petitioner did not directly contest the propriety of his graduation, and it pointed out that the arguments that came closest to suggesting such a claim – specifically, the argument that all areas of his disability were not addressed by the goals and objectives of the April 19, 1999, IEP – were *not* advanced on appeal. *Id.*, p. 13. Instead, Petitioner claimed only that he should have received *notice* of his impending graduation. Yet Petitioner did not suggest that "this lack of notice rendered his graduation invalid." *Id.* The court concluded: "By failing to directly challenge the validity of his graduation, [Petitioner] essentially concedes both that the claimed procedural defect was harmless and that the appeals officer had no jurisdiction to hear his claim." *Id.*, pp. 13-14.

Federal courts have repeatedly held that technical procedural defects do not result in a violation of the IDEA if there is no substantive deprivation. *See, O'Toole v. Olathe Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998) (stating technical irregularities in IEP are not necessarily violative of the IDEA); *Urban v. Jefferson County School Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996)

(noting technical deviations from the requirements of the IDEA, such as the failure to include a statement of transition services, do not render an IEP entirely invalid); *Cordrey v. Euckert*, 917 F.2d 1460, 1467 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991) (school's procedural failure to document parents' refusal to attend IEP meeting inconsequential); *Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (declining to "exalt form over substance" by holding that technical deviations from the IDEA's procedural requirements render an IEP invalid); *Burke Cty. Bd. of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (minor procedural faults of school board were insignificant since they did not cause the child to lose educational opportunity). The Tenth Circuit correctly concluded that Petitioner's allegation that he was denied "notice" of his impending graduation, without more, did not state a claim for denial of substantive educational benefits.

The Court of Appeals next considered Petitioner's claim that he was entitled to an "exit meeting" under Oklahoma law for an evaluation to determine whether graduation was appropriate. Noting that the regulation under the applicable section of the IDEA, 20 U.S.C. § 1414(c)(5), specifically states that "an evaluation is not required before a termination of benefits due to graduation with a regular high school diploma," the court expressed doubt as to whether Oklahoma law could be construed in the manner urged by Petitioner. *Opinion*, p. 14 of Petition for Writ of Certiorari, citing 34 C.F.R. § 300.534. Yet even if Oklahoma law so provided, the court concluded that "we still fail to see any substantive deprivation resulting from the alleged procedural defect." *Opinion*, p. 14 of Petition for Writ of Certiorari.

This identical issue was addressed in *Quaker Valley Sch. Dist.*, 30 Individuals with Disabilities Education Law Report (IDELR) 634 (SEA PA 1999). There, the parents of a 19-year-old high school graduate requested a due process hearing, claiming that their daughter's graduation was not valid and that she was still entitled to special education. The parents alleged, among other things, that the school failed to conduct a final IEP meeting before their daughter's graduation. In ruling in favor of the school, the appeals panel stated that "[student's] college application manifests her graduation desires, the prospects for which parents knew of through the IEP's provisions. . . . " *Id.* at 637. "Testimony of sufficient graduation credits then couples with parental knowledge and student desire to satisfy obvious regulatory intent while rendering harmless the error of not holding a memorializing IEP meeting." *Id.*

The record presented to the Court of Appeals established beyond doubt that Petitioner was prepared for, desirous of, and properly deemed eligible for graduation from the Stroud School District at the end of his senior year. More important, Petitioner made absolutely no claim that he was entitled to or should have been permitted to continue his secondary education at the Stroud School District or that the award of a regular diploma and his graduation from high school were inappropriate. In the absence of an allegation that he was deprived of some substantive educational benefit, the Court of Appeals correctly concluded that Petitioner's claim of a procedural mistake was insufficient to create a live case or controversy. *See, Urban*, 89 F.3d at 727 (observing that "[b]ecause the District's procedural violation did not

amount to a substantive deprivation . . . there was no violation of [student's] right to an appropriate education.").

The court next addressed Petitioner's claim that in the absence of an exit IEP meeting and notice of an impending change in placement, the School District should have convened a due process hearing under 20 U.S.C. § 1415(b)(6) to receive "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child. . . . " The court again noted that Petitioner alleged no substantive deprivation relating to the alleged procedural defect. Because Petitioner did not contend that he was unqualified to graduate or that any of the alleged procedural defects denied him FAPE, he failed to state an actionable claim. *Opinion*, p. 15 of Petition for Writ of Certiorari.

Before an administrative officer may proceed with a due process hearing request, the hearing officer must have subject matter jurisdiction. A due process hearing may be convened to hear evidence on issues involving the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. *See* 34 C.F.R. § 300.507(a). Implicit with the commencement of a due process hearing is the requirement that there be a *live case or controversy* involving a student. Under the IDEA, "[t]he obligation to make FAPE available to all children with disabilities does not apply with respect to . . . [s]tudents with disabilities who have graduated from high school with a regular high school diploma. . . . " 34 C.F.R. § 300.122(a)(3)(i).

Petitioner's requests for services clearly extended beyond his successful completion of a secondary school education. Indeed, even if his requests could be construed as alleging a denial of FAPE, it is well established that "the right to receive special education and related services – including transition planning and services – ceases when a student receives a high school diploma. . . . " *Novato Unified School District*, 22 IDELR 1056, 1064 (SEA CA 1995).

In *Novato*, the parents of an 18-year-old student with a serious emotional disturbance alleged that his school district denied him FAPE by failing to provide him adequate transition planning and services prior to awarding him a high school diploma. In addressing whether the parents were entitled to request a due process hearing after their child had graduated, the hearing officer in *Novato* made clear that "[t]he parents were correct in assuming that after the award of a diploma, [they] would not have had any right to demand services, to call for an IEP meeting, *or to request a due process hearing*." *Id.* at 1065 (emphasis added). *See Chuhran v. Walled Lake Consolidated Schools*, 839 F. Supp. 465, 473-74 (E.D. Mich. 1993), *aff'd*, 51 F.3d 271 (6th Cir. 1995) (Table) (stating that the successful completion of general graduation requirements in light of a student's IEP normally constitutes an adequate FAPE and forecloses further special education services under the IDEA); *Montgomery County Pub. Sch.*, 22 IDELR 754 (MD SEA 1995) (holding that although district failed to conduct a review meeting prior to graduation to include the foster parents in the final graduation decision and such failure amounted to a procedural violation of federal and state special education law, the violation did

not deny FAPE because the student reasonably benefitted from his education, received appropriate transition services, and was properly graduated).

Finally, the Tenth Circuit observed that even if it were willing to indulge in the "questionable assumption" that Petitioner was attempting to challenge his graduation from high school, Petitioner had "waived any argument that the school district denied him a FAPE because he has not made such a contention on appeal." *Id.* The court observed that it is "well settled that, without a claim that the FAPE was deficient, procedural defects are not actionable." *Id. See, Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999) (holding that a parent's claim for compensatory education was properly denied by the district court based on the parent's failure to contend that her son's IEP did not provide him FAPE).

The court flatly rejected Petitioner's argument that he was not in the position to assert a denial of FAPE because he could not know this without the aid of a due process hearing. The court noted that Petitioner "does not argue that the alleged procedural mistake was itself a deprivation of a FAPE[,] [t]hus he necessarily does not argue that the deprivation caused his graduation to be improper." *Id.* The court concluded that even if it were to "stretch the language" of Petitioner's brief, the court "still could not glean from it a claim of a substantive deprivation." *Id.*

The Court of Appeals also noted that Petitioner "makes a murky argument implying that he failed to obtain necessary 'transition services.' " The court pointed out that Petitioner did not identify what such services

might be and further observed that this was a request for prospective relief for which Petitioner should look to his post-secondary educational institution under the Rehabilitation Act, 29 U.S.C. § 794. *Opinion,* p. 16 of Petition for Writ of Certiorari.

This issue was addressed in *Daugherty v. Hamilton County Schools,* 21 F. Supp. 2d 765 (E.D. Tenn. 1998). In *Daugherty,* among other things, the plaintiff challenged an administrative law judge's ruling that he was not entitled to services under the IDEA beyond his successful graduation from high school. Significant to the court's ruling was the fact that the plaintiff did not contest his successful graduation from secondary school. *Id.* at 774. The court in *Daugherty* stated:

> Plaintiff failed to demonstrate his particular claim is anything more than a request for additional psychiatric, social, and emotional services beyond that already provided by the [school]. It is important that [plaintiff] does not contest the types or adequacy of the services he did receive from the [school]. Additionally, he did not overcome the facts of his successful graduation which is uncontroverted evidence his "learning process" is intact. Notwithstanding his completion of a secondary school education, [plaintiff] also failed to describe sufficiently the services he requested as the cause of his inability to receive a FAPE; the services he seeks focused primarily on non-educational aspects of his difficulties. To grant [plaintiff's] claim would extend [school's] financial liability beyond the dictates of the IDEA to provide an appropriate education.

Id. See, Chuhran v. Walled Lake Consolidated Schools, 839 F. Supp. 465, 473-74 (E.D. Mich. 1993), *aff'd,* 51 F.3d 271 (6th Cir. 1995) (Table) (noting that the successful completion of general graduation requirements in light of a student's IEP normally constitutes an adequate FAPE and forecloses further special education services under IDEA).

Finally, the court concluded that the question of the timing of Petitioner's due process hearing request – and whether the Stroud School District's obligations to Petitioner had ceased because Petitioner had completed all of the course work necessary to earn a regular diploma before his due process hearing request was received – was irrelevant because "nowhere in the district court or on this appeal has [Petitioner] explicitly contested his graduation or made a viable claim of entitlement to post-graduation relief. *Id.,* p. 17.

The Court of Appeals concluded by noting that even if it were to conclude that it had jurisdiction of Petitioner's claims, those claims would "be denied on the merits for the reasons we have set forth." *Id.,* pp. 17-18. Instead, however, the court determined "that the substantive basis for [Petitioner's] requests is so thin, and a possible challenge to his graduation so elusive, that we think the case is moot." *Id.,* p. 18.

The Court of Appeals' decision was correct, and this Court should deny Petitioner's request for the grant of a writ of certiorari.

CONCLUSION

For the reasons stated herein, Respondent Independent School District No. 54 of Lincoln County, Oklahoma, respectfully prays that Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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